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Foreword

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Legal academics and law reviews usually focus their attention on doctrine or legal philosophy, or the interfacing of other disciplines with either one or both. It is rare that they study and assess the writings of a single Justice of the Supreme Court. Indeed, with few exceptions, most members of the Supreme Court leave the bench without ever having their writings reviewed and assessed as a whole. In October 1990, however, a group of prominent legal scholars gathered at the Benjamin N. Cardozo School of Law, under the auspices of the Jacob Burns Institute for Advanced Legal Studies, to assay Justice Scalia's jurisprudence, even though he has been a member of the Court for less than five years.[1]

The idea of the conference was based on the speculative view that Scalia's judicial writings are distinctively influential. This seems true not so much with Scalia's colleagues on the high Court, as it is with some federal and state court judges. Moreover, Scalia's influence seems to extend well beyond the judiciary to those who participate in the public debate on the important issues the Court regularly confronts and on the role of the Court itself in our governmental structure.

Several factors appear to combine to draw attention to Scalia's writings and to make them influential. Scalia's substantive positions on issues of public as well as academic interest are controversial, if not extreme.[2] This has not been entirely surprising since Scalia was nominated by President Reagan to the Court as a judicial conservative who

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* Professor of Law, Benjamin N. Cardozo School of Law and the Conference Director. I wish to thank the Jacob Burns Institute for Advanced Legal Studies for the grant that made the conference possible, and the Cardozo Law Review, especially Robin Flicker, for assuming the responsibility for coordinating the arrangements for the conference.

[1] Associate Justice Antonin Scalia was nominated by President Reagan to the United States Supreme Court on June 17, 1986. N.Y. Times, June 18, 1986, at A8, col. 6. He was confirmed by the Senate on Wednesday, Sept. 17, 1986 by a vote of 98 to 0. N.Y. Times, Sept. 18, 1986, at A1, cols. 1 & 2. He took his seat on the Court as an Associate Justice on October 6, 1986. N.Y. Times, Oct. 6, 1986 at A1, col. 3.

[2] *E.g.*, Rutan v. Republican Party, 110 S. Ct. 2729, 2746 (1990) (Scalia, J., dissenting); Cruzan v. Director, Missouri Dep't. of Health, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part and concurring in judgment); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

would interpret the Constitution narrowly and seek to undo a generation of Court-created rights.

Scalia would seem to have fulfilled his nominator's hopes. He would discard the doctrine of substantive due process as unjustified[3] and considers prior Supreme Court decisions based on a substantive due process analysis as illegitimate and deserving of being overruled. As a result, Scalia favors—almost pleads for—the overruling of *Roe v. Wade*,[4] the momentous 1973 decision that provided women with a constitutionally protected right to an abortion. He unequivocally asserts that "federal courts have no business" addressing the "difficult, indeed agonizing, questions that are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it."[5] Scalia has also urged that political party membership is a constitutionally permissible consideration in the dispensation of public employment.[6] As he emphatically stated: "The choice between patronage and the merit principle—or, to be more realistic about it, the choice between the desirable mix of merit and patronage principles in widely varying federal, state, and local political contexts—is not so clear that I would be prepared, as an original matter, to chisel a single, inflexible prescription into the Constitution."[7] He has argued strongly that the Constitution does not permit state and local governments to implement affirmative action plans unless such plans are "necessary to eliminate their own maintenance of a system of unlawful racial classification."[8] Scalia was the only dissenter in a case in which the majority sustained a congressional statute creating the independent prosecutor,[9] which grew out of the Watergate scandal.

The attention given to Scalia's writings results not just from the outcomes he reaches, but also from his insistence on originalism as the most defensible interpretative method for construing the Constitution. Although Professor David Strauss has raised in his paper serious questions as to whether Scalia is a consistent "originalist,"[10]

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[3] *See* Cruzan v. Director, Missouri Dep't. of Health, 110 S. Ct. at 2859-60.

[4] 410 U.S. 113 (1973). *See, e.g.*, Webster v. Reproductive Health Servs., 109 S. Ct. at 3064.

[5] Cruzan v. Director, Missouri Dept. of Health, 110 S. Ct. at 2859.

[6] *See* Rutan v. Republican Party, 110 S. Ct. at 2746 (Scalia, J., dissenting).

[7] *Id.* at 2747.

[8] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524 (1989) (Scalia, J., concurring in judgment).

[9] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). Scalia was also the only dissenter in Mistretta v. United States, 488 U.S. 361, 413 (1989).

[10] Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1710-11 (1991). *See also* Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

Scalia, as Professor Burt argued in his article, "emphatically rejects the proposition that 'interpretation [of the Constitution] must change from age to age' and that the proper function of the Supreme Court is 'to apply current societal values' in constitutional adjudication."[11] Instead, Scalia insists that the original intent of the drafters of the Constitution is, as Professor Burt has characterized his views, "the only legitimate source of constitutional authority."[12] Scalia acknowledges the difficulties of reconstructing the intention of the framers, but he contends that the defects of originalism are preferable to those that result when a judge invokes fundamental values as the touchstone for constitutional interpretation.[13]

Although Scalia's outcomes and method are mainly responsible for the attention his writings currently receive, his superb writing style also contributes. This not only means that he chooses his words well and that his sentences propel the reader quickly through the text, but it also means, as Professor Fried so deftly highlighted during his Keynote address,[14] that Justice Scalia's writings engage the reader as though he were thinking out loud (for the reader's benefit) as he debated his choice of word and punctuation. Scalia's writings also draw attention because he does not shrink from being combative, as when he ridiculed a statement of Justice O'Connor's as one that "cannot be taken seriously,"[15] or colorfully maintained that the nine members of the Court were no more able than "nine people picked at random from the Kansas City telephone directory" to decide when life becomes "worthless" or when medical procedures to preserve it become "inappropriate" or "extraordinary."[16]

Scalia's notoriety on the high Court seems also due to his willingness to go it alone. Fiercely insistent on his positions, he is willing—perhaps eager—to pen an opinion even though it is not eventually joined by one of his colleagues. The immediate result of this penchant is a growing body of opinions to which Scalia has given a strong personal stamp. The long-term consequence of this tendency, however,

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11 Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1687 (1991).

12 *Id.*.

13 Scalia, *supra* note 10, at 863. During his confirmation hearings, Scalia informed the Senate Judiciary Committee: "I think it is fair to say you would not regard me as someone who would be likely to use the phrase, living constitution." *Hearings before the Committee of the Judiciary, United States Senate*, 99th Cong., 2nd Sess., 48 & 142 (August 5 & 6, 1986).

14 Regrettably, Professor Fried did not wish to publish his Keynote address.

15 Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part and concurring in judgment).

16 Cruzan v. Director, Missouri Dep't. of Health, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring).

may be that Scalia runs the risk of "being marginalized," at least as one academic observer has noted.[17]

Scalia is prolific and his writings are so voluminous as to challenge any effort to make an overall assessment. As a result, the one-day Cardozo conference was structured on the assumption that less was more. Instead of trying to canvass all or most of the subjects he has addressed, only four topics were selected. Two of these—his attitude toward precedent and his conception of the good society—were somewhat open-ended and crisscrossed many fields. The other two—Scalia's approach to statutory interpretation and the commerce clause—were more circumscribed. The consequence of narrowing our focus, I believe, is that the conference participants bore deeper into their subject than they collectively could have, had we increased the number of substantive topics to be explored.

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[17] *The Court's Mr. Right*, NEWSWEEK, November 5, 1990, at 62.